

The Administrative Law Judge found he had no authority to extend the time to proceed to Regular Hearing because the motion to file for an extension was offered more than a month after the five years allowed by K.S.A. 44-523(f) had passed. Therefore, the ALJ dismissed the claim with prejudice for lack of prosecution.

Claimant requests review, arguing there has not been a lack of prosecution for five years as claimant has sought medical treatment on several occasions since his injury. Claimant further argues respondent has not been prejudiced with the lack of prosecution as they had been providing treatment up until claimant's incarceration. Additionally, respondent was timely given the opinion of Edward Prostic, M.D., about further treatment. Claimant contends the motion to extend is timely as it was made within five years of the filing of an application for preliminary hearing, which was done in September 2008 and a preliminary hearing was held in October 2008.

Respondent argues the Order should be affirmed.

FINDINGS OF FACT

Claimant alleges he met with personal injury by accident on May 13, 2008, the day he was given work restrictions for diagnosed carpal tunnel syndrome. An Application For Hearing (E-1) was filed with the Division on June 2, 2008. An Application For Preliminary Hearing (E-3) was then filed on September 10, 2008, with the matter going to preliminary hearing on October 29, 2008, (no record) and June 10, 2009 (transcript filed June 23, 2009). No activity occurred in this matter for over one year and the matter was changed to inactive status on June 30, 2010.

Several attempts were made to take claimant's deposition, with the deposition scheduled on April 26, 2011, May 11, 2011, and May 23, 2011. However, claimant's attorney was unable to locate claimant, who, unknown to his attorney, had been incarcerated. Claimant remained in jail until May 2013. Claimant contacted his attorney upon being released and an examination was scheduled with Edward Prostic, M.D., on June 10, 2013.

Claimant filed a Motion For Extension Of Time To Hold Regular Hearing with the Division, with a stamped filing date of July 11, 2013. Claimant contends the Motion was filed on June 26, 2013. A hearing on claimant's Motion was scheduled for March 12, 2014. However, no hearing was held and the matter was taken under advisement by the ALJ in order to allow the parties to submit written briefs arguing their positions on claimant's Motion. The March 24, 2014, Order of Dismissal was then entered by the ALJ.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2007 Supp. 44-523(f) states:

(f) Any claim that has not proceeded to final hearing, a settlement hearing, or an agreed award under the workers compensation act within five years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, shall be dismissed by the administrative law judge for lack of prosecution. The administrative law judge may grant an extension for good cause shown, which

shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the five year limitation provided for herein. This section shall not affect any future benefits which have been left open upon proper application by an award or settlement.

Claimant's alleged accident date is May 13, 2008. The E-1 was filed on June 2, 2008. The Motion for Extension was filed, at the earliest, on June 26, 2013, if claimant's date is accepted, and on July 11, 2013, based upon the file stamped date on the Motion filed with the Division.

The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained.¹ When a statute is plain and unambiguous, the court must give effect to the legislative intention as expressed in the statutory language.² If the statutory language is clear, no need exists to resort to statutory construction.³

The ALJ correctly recognized the limitations contained in K.S.A. 2007 Supp. 44-523(f). If the five year limitation is passed, the ALJ has no choice but to dismiss the matter. The ALJ may grant an extension, but only if the motion requesting same is filed within the five year time period following the filing of the application for hearing, E-1. The language of the statute makes the filing of the E-3 irrelevant.

Claimant's five year statute of limitations passed on June 2, 2013. Claimant's Motion was not filed until, at the earliest, June 26, 2013, according to claimant and July 11, 2013, according to the division records. Either date is untimely. The dismissal of this matter is mandated by the Kansas legislature. The Order of Dismissal is affirmed.

CONCLUSIONS

After reviewing the record compiled to date, the Board concludes the Order of Dismissal should be affirmed. Claimant has failed to satisfy the legislative mandates of K.S.A. 2007 Supp. 44-523(f).

DECISION

WHEREFORE, it is the finding, decision and order of the Board that the Order of Dismissal of Administrative Law Judge Bruce E. Moore dated March 24, 2014, is affirmed.

¹ *Winnebago Tribe of Nebraska v. Kline*, 283 Kan 64, 77, 150 P.3d 892 (2007).

² *Hall v. Dillon Companies, Inc.*, 286 Kan. 777, 785, 189 P.3d 508 (2008).

³ *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007).

IT IS SO ORDERED.

Dated this _____ day of May, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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